A COURT-MARTIAL TRIAL.

Convening Authority.—Congress has empowered the army to exercise judicial powers, but has not established any particular courts nor elected justices thereof. It has empowered certain officers to appoint courts. The commanding officer of a division and certain other enumerated commanding officers have power to appoint a general court, and the commanding officer of a regiment and certain others can appoint a special court. The person exercising this power is known as the convening authority, and the power is exerted through an order.

The court may be convened for the trial of a particular case or of such cases as may be brought before it.

The Several Kinds of Courts.—Military courts are either general, special or summary.

A general court consists of not more than thirteen nor less than five members. This is the "G. C. M." that is so much spoken of by the British, who always use initials. Officers are tried before this court along with others guilty of serious offenses.

A special court may not have more than five nor less than three members. It is not a very necessary institution and in some commands is not appointed.

Lastly, there is a summary court, the justice of the peace of the army. He gets the minor cases, those just above kitchen police.

The Dress of the Court.—In peace time it is sometimes necessary for the order convening the court to specify the dress to be worn, but during the war but one uniform is worn and on all occasions.

The members of the court and the witnesses wear side arms. This is supposed to be for protection. Probably the first court sat in Virginia around Hillsville. No such protection is afforded the judge advocate nor the counsel for the defense.

The senior member, who is the president without appointment, sits in the center of a linear or semicircular formation, depending upon the shape of the table, with the next senior officers on his right and left alternatingly. At another table are

seated the judge advocate and his assistant, the counsel for the defense and the person to be tried, whose official status is that of a "prisoner awaiting trial," and who is escorted to the place of justice by a chaser. Near the judge advocate is the reporter and convenient to all concerned is the witness chair.

Decorum of the Court.—Members of the court are required, by the manual, to be dignified and attentive and are expressly forbidden to read newspapers. I have never known a member to be undignified nor to read a newspaper; and, while there have been moments when I seriously doubted the attentiveness of a member, they have it all over a civil justice for listening to the evidence and the argument. Each member is provided with a pencil and pad and I have known them to draw funny looking pictures, but the newspapers say the President does the same thing at the Peace Conference.

In the conduct of a case, counsel come in very close contact with the members of the court and the manner of handling a case counts. It pays to jolly them along and not quibble over every point that arises. "Never try to be technical," is the rule to follow.

In a case at Camp Lee, as counsel for the defense, I associated a member of the Petersburg bar with me. After talking the case over and sleeping on it for a night, he suggested that possibly he had better retire, as the presence of civilian counsel might be harmful to our client. We finally decided that I should handle the case and that he should sit quietly by. This was done and was apparently agreeable to the court, for the president congratulated us on the pleasant manner in which we had conducted the case. That is all that I can tell of the reception given civilian counsel in a military court

The Judge Advocate.—The same order that creates the court names the judge advocate and his assistants.

The judge advocate, frequently called familiarily the "J. A.," is the most important part of the judicial machinery. No one else takes the initiative in anything, but all await the action of the judge advocate. He does everything for everybody and his duties range in increasing dignity from fixing the fire in the Sibley stove to swearing in the members of the court. If any-

thing goes wrong, the president remarks, "The judge advocate will see that this does not occur again."

Indictments, Informations, Presentments and Complaints.— The above are, I think, the usual terms used in the civil law. In the military law there is simply the charge, which is defined as corresponding to the civil indictment.

The charge consists of two parts, the technical charge and the specification. There may be several charges and specifications. There may be one or more specifications under each charge. The charge simply alleges an offense in violation of a particular article of war, and the specification alleges facts to sustain the allegation.

Form of charge and specification:

Charge I. Violation of the 93d Article of War.

Specification 1: In that Pat Jones Smith, Co. B, 317 Inf., did at Petersburg, Va., on or about the 23d day of March, 1919, in the nighttime break into and enter the dwelling houses, etc.

Specification 2: In that, etc., wilfully, etc., burn the dwelling house, etc.

The charges are numbered consecutively and the specifications numbered under each charge. A charge and its specifications correspond to a count in the civil indictment.

Printed charge sheets are furnished by the army and the charge is prepared by filling them. This is usually done by the person who is the accuser and the same person signs the charges; but, in the case of an enlisted man, the company commander usually signs the charge, by cause of the fact that he is responsible for the behavior of the men of his company and any wrong conduct on their part is an injury to him.

The person preparing the charges also prepares a statement of the testimony expected from the various witnesses in the case.

The charges and the statement of expected testimony are delivered to the officer having summary court authority. Then the case is investigated by such officer or some one appointed by him. The report of this investigation is attached to other papers and sent to the convening authority, the commanding of-

ficer, who decides what court shall try the case and forwards, by indorsement, all the above-mentioned documents to the judge advocate of the chosen court. This is the first the latter knows of the case officially. The investigation mentioned corresponds in a way to the hearing of a grand jury.

While all papers mentioned come to the judge advocate, he is interested only in the charge sheet, but must care for and return them all. The expected testimony statement and the report of investigation are for the use of the convening authority and do not constitute records in the trial. They are no part of the record.

The charge contains a list of the witnesses and the accused is entitled to know them to prepare his defense.

When the judge advocate receives the papers in the case he visits the prisoner in the guard house or stockade, delivers a copy of the charge sheet to him or to his attorney, tells the prisoner what the elements of the offense are, how easy it is to prove them and that for the offense the prisoner may suffer death or such other punishment as a court-martial may direct, with special emphasis on the words "suffer death." This puts him in the proper frame of mind, if the sergeant of the guard hasn't already seen to that.

Counsel for Defense.—When the judge advocate delivers the copy of the charge sheet to the prisoner he tells him that he may have counsel of his own selection if he so desires. This is a matter of absolute indifference to most prisoners, but I can not say whether it is because they think their cases are hopeless or whether they are possessed of a true sense of value of counsel for the defense. In most cases they are satisfied to let the judge advocate handle both sides of the case. This arrangement was not at all satisfactory to me in a case in which I was judge advocate and in which my colonel was the accuser. I was afraid to assume the full responsibility of a failure to convict. Therefore, I insisted that this particular defendant needed counsel and finally succeeded in having him accept the services of a second lieutenant, and was highly delighted when he did, but the acceptance had been reluctant and the defendant's hopes had not been in any degree elevated.

The prisoner is entitled to counsel of his own selection, but usually there is no one who is particularly preferable to him. His best friend has always been his platoon or company commander and the chances are that this same person is the one who has preferred the charges. The result is that if the prisoner would choose he must choose from strangers. He is equally willing to accept the services of some one whom the judge advocate finds available. During the sitting of a general court this winter, a number of men were brought up for trial on charges of desertion. These men had deserted while their organizations were in this country and had been found or had given themselves up after the signing of the armistice. They knew no one in the camp and consequently had difficulty in getting counsel. The judge advocate asked me to defend a man who was tried one morning. When the trial was over he insisted I defend another who was to come on for trial in the afternoon, which I did. This continued for sometime. I became a permanent counsel for the defense.

Securing Presence of Persons for Trial.—This is the duty of the judge advocate. He usually sees the president of the court and finds the time that is most convenient to him. Then he interviews all other persons concerned and the hour is set. Of course he sees that the time for trial is agreeable to the accused and his counsel. It is usually necessary to see the prison officer or the officer of the day in order to insure the presence of the accused. The judge advocate also notifies the witnesses needed. This is usually informal, a subpœna not being required. The counsel for the defense usually rounds up his own witnesses.

Place of Trial.—While the order fixes the post or camp at which the court is to sit, the judge advocate has to find the room and have it cleaned, heated and furnished. The army does not build court houses. The room may be a dining hall, store room, sleeping quarters, a tent, etc.

Presence of Accused.—A certain lawyer of the State of Virginia once sustained the reputation he had acquired as a jail robber by asking the court permission for an interview with his

client. The interview was granted and counsel and client retired to secrecy of the attorney's office. Either during the interview or an interruption, the client succeeded in passing out of the window and making good his escape. Result, he was not convicted.

This would have resulted otherwise in a court-martial, where the court would have proceeded with the trial in the absence of the accused. After the court has assumed jurisdiction it cannot be deprived of such by any act of the accused. The manual reads "during such absence it is proper for his counsel to continue to represent him in all respects as though present."

Arrest and Confinement of Accused.—Before trial the accused is either in arrest or confinement. Usually, if an officer, he is in arrest, and, if an enlisted man, he is in confinement. An enlisted man may be in arrest, in which case he goes to drill and fatigue, but he is watched over by the noncommissioned officer in charge of quarters at other times, and is permitted to leave the barracks only to go to mess and the latrine.

Confinement must be authorized by an order, generally of the company commander. "In confinement" means being placed in the guard house or stockade. The status of a person in such position is that of a prisoner awaiting trial. He is in custody of the guard and leaves the guard house chaperoned by a "chaser," who also takes him to the place of trial.

An officer is usually placed in arrest pending trial.

There is a form of punishment for an officer independent of a court-martial, that is receiving a censure. This is for some light offense that is not apt to recur after the censure has been properly administered.

Then there may be an arrest which is not to be followed by a trial. The officer is first placed in arrest by his commanding officer, who makes a written report to the brigadier, who in turn reports to the adjutant general, and the report is filed with the officer's record.

Just as in the case at civil law where there is no necessity of a warrant to make an arrest for an offense committed in the officer's presence, so, in the military, an arrest may be made for

a quarrel, fray or disorder without an order. This is often done by the military police. Civilian authorities may arrest deserters.

"The Court Will Come to Order."—At the appointed time the president calls the court to order. The judge advocate either calls the roll or informally notes the presence or absence of the members of the court for future use in making up the record. The prosecution announces it is ready to proceed to the trial of the accused, who does or does not desire counsel. If he does not, the president will ask him if such is the case.

The accused may challenge any member of the court just as a juror may be challenged, and he may challenge the entire court if not properly convened or where the convening authority is disqualified by interest. In the last case the next higher authority convenes the court.

The members of the court, the judge advocate, the witnesses, reporter and interpreter are all sworn for each case that is tried.

Pleas.—The defendant can plead dilatory pleas and, of course, the usual pleas of guilty and not guilty.

If the plea is guilty in whole or in part, the president of the court must explain to the accused the elements of the offense and the maximum punishment. The accused is then asked if he understands and still desires to stand by his plea. Where the plea is guilty to only a part of the offense charged, the form is, Guilty, except the words "————," substituting therefor the words "————;" of the excepted words, "Not guilty" and of the substituted word "Guilty." Such a plea is usually interposed in desertion cases, by substituting "absence without leave" for "desertion."

Admission of Evidence.—One of the many rumors that I have heard while in the army is that Prof. Wigmore compiled that part of the manual relating to evidence.

Usually evidence is freely admitted and counsel ask such questions as they desire without objection. As judge advocate, I have obtained information of the matter in hearing by asking a question framed in this fashion, "Private Smith is charged with refusing to obey Sergeant Jones on August 15th. Tell the court all you know about this." In some courts, though, this

question would be ruled out, for occasionally one finds a president, who has had much experience in sitting on cases and who knows the manual relating to evidence. There is no reason for excluding evidence for there is no jury to mislead and counsel can comment on the nature of the evidence in argument.

All witnesses whether for the prosecution or the defense are introduced and sworn by the judge advocate. To introduce a witness for the defense, the judge advocate announces to the court that the defendant desires to introduce a particular person as a witness. To the witness he states "you will be sworn" and swears him. He asks the witness two questions. First, "State your name, rank, organization and station;" and second, "Do you know the accused?" Adding, if he desires, "If so, state his name, rank," etc. These questions answered, the witness is turned over to the defense.

When the judge advocate calls a witness, the latter equipped with sidearms, belt and bayonet or belt and pistol, and wearing gloves steps into the court room, salutes the judge and removes the headdress and right hand glove. The witness should sit erect and not cross his legs. When the judge advocate indicates to the witness that he may depart, he should rise, put on his hat, salute and retire.

Witnesses are always examined apart. Segregation is mandatory.

The accused may testify in his own behalf. He may be sworn and testify as any other witness, may make a statement or may say nothing. If sworn to testify in his own behalf, he is subject to cross-examination as any other witness. The counsel for the defense usually has his client make a statement, which is not under oath and as to which there can be no cross-examination. This is the best plan to pursue with a client, whom you have reason to believe is not telling the truth or one who would not make a good witness. This proceeding will appeal to the criminal lawyers, who will regret it does not apply in the civil courts.

After a witness has been examined and cross-examined by the judge advocate and counsel for the defense, he is turned over to the court. It often happens that the court goes quite

beyond the evidence previously brought out. After the court has examined, if counsel desire to examine further, their questions must be reduced to writing and submitted to the court.

In the manual we find the names of our old acquaintances, Presumption of Innocence and Reasonable Doubt, but they are not so well known in a court-martial. The presumption is poor protection and guilt is not a matter of any great doubt. A court-martial seldom acquits.

Finding and Sentence.—The court makes a finding of guilty or not guilty. This is by a mere majority except in capital cases and in such cases by a two-thirds vote. The finding is on each charge and specification on the charge sheet. A finding of an included offense is, with exceptions and substitutions as is the plea, mentioned. The court may also substitute the 96th Article of War for another article named in the charge. The 96th Article is a general article and includes any conduct unbecoming a soldier or to the discredit of the service. In its finding the court can substitute this article for one relating to some specific offense. The finding would except the specific article and substitute the general.

After it has made a finding the court opens and the judge advocate reads what it is unofficially known as the military record. This is a part of the charge sheet and embraces the age, date of enlistment, rate of pay, allotment and previous convictions of the accused. If there have been no previous convictions the judge advocate so states. If there have been, he proceeds to introduce evidence thereof. The judge advocate will also note any irregularities that have taken place in the trial. The court then closes and sentences the accused. The maximum punishments are printed in what is known as the Executive Order.

"The Court Will Close."—The court will always close when a vote is to be taken. The members may retire to another room or have all persons present retire from the room in which the trial is being held. In the latter case the judge advocate is the last to leave and the first to reenter. He is on both occasions between the counsel for the defense and the court. To avoid

closing the court on questions arising during the trial, the president will say, "without objection, the request will be granted" and then, "There being no objection, the request is granted." To again open the court after it has closed, the president so announces to the judge advocate, who enters first, as mentioned.

The Record.—The trial over, a record is prepared by the reporter and corrected and signed by the president and judge advocate. Then it is returned by the judge advocate to the convening authority. This is done by way of an indorsement. The convening authority now becomes the reviewing authority, who has power to approve or disapprove the finding. The reviewing authority issues an order which gives effect to the sentence of the court. Such person exercises appellate jurisdiction but no formal hearing before him is provided for.

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